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# **Beyond the National Resource Privilege: Towards an International Court of the Environment**

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## **Introductory Remarks**

In times of increasing resource scarcity, environmental degeneration and mass abject poverty, control over natural resources is the subject of heated debate within political, economic and academic circles. In international law, control over natural resources has traditionally been understood as the privilege of sovereign states.<sup>i</sup> This national resource privilege was enshrined in international politics in the 1962 United Nations (UN) Resolution on Permanent Sovereignty over Natural Resources, which states that 'the rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the People of the State concerned.' As Robyn Eckersley (2007: 308) observes, 'this principle had originally been formulated as a *human* right belonging to peoples or nations that had been subjected to colonial rule to freely dispose of their natural wealth, [but] since the 1972 Stockholm Conference on the Human Environment it is more typically formulated as a right belonging to sovereign *states* [sic].'

The problem is that our current inability to combat climate change and environmental degeneration effectively, as well as the coming into existence of both these issues, seem to be at least partially connected to the fact that states enjoy sovereign control over their natural resources, which has often lead to wasteful and unsustainable management and use practices. While on the political level the 1992 Rio Declaration rhetorically somewhat weakened the national resource privilege by stressing every state's developmental and environmental responsibility towards present and future generations, the 1992 UN Convention on Biological Diversity again explicitly 'reaffirms that states have sovereign rights over their biological resources'. Thus, even though there has been a huge amount of multilateral agreements on environmental issues, the truth is that states' sovereignty over their natural resources can only be weakened if states *voluntarily* agree to become part of agreements which curtail their

powers.<sup>ii</sup> However, partially as a result of the vast amount of international environmental agreements international environmental law does offer several ways to restrict particular resource uses.<sup>iii</sup>

What is striking when looking at the academic debate, though, is that within normative political theory the national resource privilege is rarely challenged.<sup>iv</sup> When it comes to control over natural resources normative philosophy has been for the most part awfully quiet. Notable exceptions are Thomas Pogge's (1994; 2008) and Leif Wenar's (2008) works, which have highlighted some of the unjust and unequal effects of current resource management regimes. However, as surprising as it might sound, Pogge and Wenar both do not challenge the idea that natural resources should be controlled by the states in whose territory they are found. As Pogge (1994: 200-201) puts it:

Nations (or persons) may appropriate and use resources, but humankind at large still retains a kind of minority stake, which, somewhat like preferred stock, confers no control, but a share of the material benefits... One may use unlimited amounts, but one must share some of the economic benefit.

Similarly, Wenar cites the 1966 UN International Covenant on Civil and Political Rights which claims that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources' and he goes on to claim that the stated principle is 'so intuitive that most will need no more proof than its statement' (Wenar, 2008: 10). Since Pogge is mainly concerned with the distribution of the benefits of resource use while Wenar wants to make sure that all members of a People get a say in what happens to their nation's natural resources, both do not question the national resource privilege as such.<sup>v</sup>

The only group of philosophers which has repeatedly questioned the resource privilege are cosmopolitan liberal egalitarians like Charles Beitz (1979), Brian Barry (1982) and Paula Casal (2011) who argue that since all human beings are morally equal and the distribution of natural resources from a moral point of view arbitrary all people should have an equal claim to an equal share of the world's natural resources.<sup>vi</sup> This rather extreme position focuses on the global extension of distributive egalitarianism but it comes with a range of problems regarding both its normative validity (Armstrong n.d.) and its overly idealist methodology (Ratner 2013: 20).<sup>vii</sup>

Apart from these two groups, within current normative political theory only the literature on territorial rights deals with the issue of control over natural resources (Miller, 2012; Nine, 2008; 2012; Moore 2012; Kolers, 2009; 2012; Meisels, 2005). However, philosophers who focus on territorial rights tend to assume that resource

rights are necessarily connected to territorial rights, meaning that also within the literature on territorial rights the national resource privilege and its normative justification are hardly ever challenged. In fact, even though philosophers writing on territorial rights admit that the link between territorial rights and resource rights might merit further investigation (Miller 2012: 254; Stilz 2011: 573), their basic assumption is that resource rights follow from territorial rights and that the justification of control over natural resources will therefore use the same (or very similar) arguments as the argument for territorial rights.

The aim of this paper is to critically challenge a particularly common set of arguments for the national resource privilege, namely those which justify the privilege with reference to territorial sovereignty and collective self-determination as part of a functionalist account of state legitimacy.<sup>viii</sup> In so doing, the paper wants to sharpen our understanding of resource rights and hint at the possibility of an alternative system for natural resource governance. Overall, the paper tries to show that full control over natural resources is not as strongly connected to sovereignty and self-determination as some might think, and that the functionalist argument for control over natural resources actually supports a radically different resource governance scheme. However, such a radically different governance scheme appears (unfortunately) rather utopian and unrealistic. Based on this observation, the paper then sets out an alternative approach to the governance of natural resources, which aims at reconciling the realities of living in a world of sovereign states bound by international law with the ethical aspirations of normative theories of global and intergenerational justice.<sup>ix</sup>

## **I. Analyzing Control over Natural Resources**

As already noted in the introduction, since the Rio Declaration in 1992 one can observe in international politics a certain tension between different principles, as on the one hand environmental and developmental responsibilities seem to play an increasingly important role, while on the other hand the doctrine of permanent sovereignty over natural resources still seems to ride strong.

The UN Convention on Biological Diversity offers a paradigmatic case. The preamble of the convention starts by stating that the contracting parties are

conscious of the intrinsic value of biological diversity (...) [and] conscious also of the importance of biological diversity ... for maintaining life sustaining systems of the biosphere, [thus] affirming that the conservation of biological diversity is a common concern for humanity.

However, this impressive statement is directly followed by the reaffirmation of the principle that 'states have sovereign rights over their biological resources.' Moreover, the general principle of the convention claims that 'states have ... the sovereign right to exploit their own resources pursuant to their own environmental policies', though this statement is again directly followed by pointing out every state's 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' This structure, which fails to give priority to either part of the principle, leads to tension between the ideas of sovereignty over natural resources and responsibility towards others.

Looking at the Rio Declaration and its succeeding conventions, one cannot help but notice that these international agreements offer significant potential for providing the framework of a more sustainable and just environmental governance regime. However, in practice this potential is far from being realized. One of the reasons for this discrepancy between the rhetoric of international agreements and their normative potential on the one side, and the political and economic reality of natural resource administration on the other side, is the important role sovereign state control plays in the current trade system and international relations more generally. As Georg Sorensen (2004) puts it, state sovereignty and collective self-determination are the rules of the game of current international relations, which are arranged in such a way that all sovereign states have good reason to participate in the existing game (making it thus self-perpetuating), since all states benefit from their supposed right to sovereignty and self-determination. This implies that any alternative scheme for natural resource governance must not only respect sovereignty and self-determination on some level (since it would be naïve to assume that states are willing to part with their privileges), but also offer significant incentives for participating in the alternative scheme.<sup>x</sup>

However, despite the crucial importance of sovereign state control for the existing system, there exist certain limits to the concept of sovereignty. In fact, it would be a grave mistake to assume that state sovereignty is an absolute concept, which virtually allows states to do whatever they want. Both in practice and in normative theory sovereignty is understood to be limited by the demands of people's universal human rights, meaning that the principles of territorial sovereignty and self-determination/non-intervention are (or at least can be) suspended if a state commits

gross human rights violations.

Therefore, as Christian Reus-Smit (2001) points out, in international law and politics sovereignty and human rights should not be seen as opposing concepts but rather as two normative building blocks of the international order. Principles like state legitimacy and self-determination/non-intervention were formed around the discourse of sovereignty and human rights. While philosophers might thus still debate the exact scope and force of human rights claims, there is no question that both international law and contemporary normative theory see the human rights regime as a necessary limit to state sovereignty and collective self-determination.

The problem I want to get at is thus not that political theorists (and international law) blindly subscribe to an absolutist interpretation of state sovereignty (since that would be an unjustified criticism), but that despite their commitment to human rights most theorists fail to critically investigate both the content and scope of states' territorial rights and the role national control over natural resources plays for securing the conditions for state sovereignty and collective self-determination. So what is the exact problem?

The national resource privilege seems problematic for at least two sets of reasons: first, in terms of the normative justification of the resource privilege as a necessary aspect of a state's right to sovereignty and self-determination; second, with regard to the resource privilege's contributing role in bringing about an international resource governance system which in many ways appears unjust and unsustainable. Let me briefly expand on both sets of problems.

With regard to the latter set of problems, it seems fair to say that the resource privilege is part of the reason why the current resource governance regime is marred by issues such as lack of access for disadvantaged groups, gross deprivation of the global poor, insufficient redistribution of the financial and material benefits from resource trade/use, unnecessary resource depletion, as well as unsustainable management practices which exacerbate environmental degradation. All these problems are of course not necessarily directly caused by the national resource privilege. But the fact that the national resource privilege, in its current shape and form, seems to have contributed to these grave problems should be considered sufficient cause to at least critically investigate the normative justification of the national resource privilege and look for possible alternatives.

In terms of the first problem, the normative justification of the resource privilege,

it was already mentioned that the literature on territorial rights seems to widely hold the assumption that sovereign statehood and collective self-determination require that states fully control the natural resources found in their territory. While within this literature heated controversy exists over the normative justification of claims to territory (Moore, 2001; Kolers, 2009; Nine, 2012; Miller, 2012), such as whether claims should be attachment-based, improvement-based, or occupancy-based, it seems doubtful that any of these arguments (i.e attachment-based, improvement-based and occupancy-based) can deliver a satisfactory justification for states' permanent sovereignty over resources (Armstrong forthcoming; Simmons n.d.).<sup>xi</sup> In section II, I will focus on what I take to be the most promising argument for the national resource privilege, namely the so-called functionalist theory that states can only be properly self-determining and/or sovereign if they control their territory and the natural resources found within it (Nine, 2010; Stilz 2009; Moore, 1998). The reason in turn why we should care about states' self-determination and sovereignty is that only self-determining and sovereign states can establish justice, safeguard people's relevant interests, bring security and stability, and provide for the basic needs of their members (Stilz, 2009; Nine, 2012).<sup>xii</sup>

Interestingly enough, the functionalist accounts by Stilz (2009), Nine (2012) and Ypi (forthcoming) suggest that states can only legitimately claim sovereign authority over territory and resources if they promote justice, which means that the right to sovereignty seems to be *conditional* in a distinctly ethical-moral sense, as the state's legitimate claim to control over resources depends on the state's performance as a justice or common good generating institution. While this might ring true, the question arises what kind of rights states need in order to be successful (or functioning) sovereign/self-determining states, and what the borders and limits of a state's right to territory and control over resources are. Another key-question is then why a sovereign state should be able to claim full control over the resources found in its territory without at least some further restrictions beyond the rather minimal ones stemming from human rights.

## **II. Sovereignty, Self-Determination and Resource Rights**

As mentioned in the previous section, one standard argument for the national resource privilege found in the literature on territorial rights is that states which have a right to territorial sovereignty and self-determination must enjoy full control over the natural

resources found in their territory in order to successfully exercise these rights and fulfil their function (e.g. meet the needs of their citizens). In other words, the basic claim seems to be that successful self-determination is for a territorial sovereign only possible if control over the materials found in the territory is secured (Moore, 2012: 86).

In order to assess this argument it makes sense to first unpack some of its elements. The argument for control over natural resources is an argument about a particular form of sovereignty, namely territorial sovereignty. Territory, though, should not be confused with property in land, meaning that claims that territory is to states what private property is to individuals are misguided.<sup>xiii</sup> As Allen Buchanan (2003: 232) points out, 'property in land is conceptually and morally distinct from the right to territory', since territory is 'a juridical concept' which refers to 'geographical jurisdiction'. This view is shared by Margaret Moore (2001: 142) who adds that 'territory refers not to property, or even land, but to a geographical area or domain of legal and political rules'. Accordingly, territorial sovereignty should be primarily understood as jurisdictional supreme authority within a given territory, and not necessarily as a form of resource ownership, or land ownership. Once it is clear that territory is a juridical concept, it is easier to understand the nature and content of territorial rights and territorial sovereignty.

The idea of territorial rights is closely connected to the idea of territorial sovereignty, since territorial rights are commonly seen as the rights of a sovereign state over its territory. John Simmons (2001: 306) argues that sovereign states possess a right to territory which includes a right to jurisdiction over those within the territory, a right to 'full control over land and resources within the territory', 'rights to tax', a right to 'control or prohibit movement across borders' and a right to limit or prohibit secession and dismemberment of the state. Anna Stilz (2009: 195) similarly claims that the territorial rights of a sovereign state feature a property component (i.e. 'the right to exercise control over the use and benefit of a particular resource'), a legislative and adjudicative component (i.e. to determine the nature and scope of control mechanisms, as well as the right 'to interpret the boundaries of the right to control'), and an enforcement component (i.e. to actually enforce the aforementioned rights). As these lists show territorial rights are a bundle of rights. The same holds true for sovereignty more generally. Sovereignty primarily refers to a range of jurisdictional powers, rights and privileges, very much akin to the lists provided by Simmons and Stilz.

However, if territorial sovereignty is indeed best described as a bundle of rights,



the question is whether all of the aforementioned rights have to be necessarily in the same hands for an agent to be considered sovereign. As Andreas Osiander (2001) and Dieter Grimm (2009) point out, historically sovereignty does allow for splitting up the abovementioned bundle of rights. In fact, sovereignty was in the times of the Holy Roman Empire a status which could be attributed to subjects on the basis of a very particular but ultimate power to adjudicate, legislate, or – more generally – to decide a contested matter (Grimm, 2009; Osiander, 2001).

Nowadays the European Union (EU) provides an excellent example for a regime of dispersed sovereignty, since states like Germany have not only given away the right to control their own borders, but have also joined a monetary union which deeply limits some of the financial privileges commonly associated with sovereign statehood. While entering into the union was the act of a sovereign state, being a member of the EU changes the distribution of rights and privileges in significant ways. Nonetheless, most people would consider Germany still a sovereign state. The bundle of rights commonly associated with state sovereignty thus seems to be divisible.

Moreover, the power of a sovereign of course needs to be legitimized. Sovereignty (understood as a state of authoritative decision-making power) - if it wants to be *legitimate* and *effective* - must be recognized and accepted by others, which depends on the fulfillment of certain functions and standards. Legitimate and just claims to sovereignty must be justified to both the members of the sovereign-community (or its subjects) and non-members whose interests are relevantly affected by the creation of the sovereign. If a sovereign fails to gain such recognition and to respect the relevant interests of those affected his/her power should be seen as a form of domination.<sup>xiv</sup> While sovereignty is thus a position of power, in its core it is a relational and even *conditional* concept, since one can only claim legitimate sovereign power in relation to others and if one fulfills certain conditions, such as meeting the needs of one's subjects. In practice, of course, many claims to sovereignty unfortunately lack proper justification, be it to the members of the state or non-members.

Self-determination is in many ways very similar to sovereignty. Self-determination primarily refers to the idea that an agent is able to act freely and autonomously, free from arbitrary outside interference. Self-determination is about the absence of alien control, paternalist intervention and domination which hinders an agent from making his/her decisions freely according to his/her own conception of the good. However, just like freedom or autonomy, self-determination is restricted, since

one's own self-determination is not allowed to relevantly harm others or violate their own right to freedom, self-determination and autonomy. The same holds true for the self-determination of collective agents, which can only be justly and legitimately self-determining as long as they do not harm other agents and violate their rights. This means that self-determination is just like sovereignty a *conditional* right, which has clear limits.

This interpretation of sovereignty and self-determination as conditional rights is widely agreed upon in normative theory as well as in the philosophy of law. As Jeff McMahan (1996) points out, the right to collective self-determination of sovereign states is not an absolute right (which can only be interfered with under extreme circumstances), since from an ethical point of view interference with a self-determining community is always possible if a group fails to fulfill its duties as a self-determining collective which owes proper justification to both its members and relevantly affected non-members. Moreover, as Martti Koskenniemi (1994: 243-244) notes, we should see the principle of self-determination as a regulatory reminder that alien control and domination are key-threats to the freedom of existing states and communities, and their respective members.

Thus, there are certain conditions which a state must fulfill in order to be able to legitimately claim a right to self-determination and territorial sovereignty. These conditions include respect for the relevant rights and interests of the individual members of the state, as well as of affected non-members (Shue 1997: 353). Thus, the power(s) a sovereign and self-determining collective agent holds have to respect the freedom and autonomy of all relevantly affected parties, no matter whether these parties are members of the state/collective, or non-members. In other words, sovereignty and self-determination are conditional rights, which come with certain *responsibilities* or duties attached. As Henry Shue's (1997: 353) notes, 'states [have to] take responsibility for everyone affected rather than only those who live on their own political territory'. This interestingly mirrors the statement from the UN Convention on Biological Diversity which postulates that each state has a 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' It is this conditionality of sovereignty and self-determination as well as the attached responsibilities which we should keep in mind for constructing an alternative resource governance scheme (see section three).

However, for now I want to return to the question of whether 'full control over land and resources within the territory' (Simmons, 2001: 306) is indeed a necessary aspect of state sovereignty and whether such control is a core-requirement for collective self-determination.

In order to be able to answer this question, though, we first have to unpack the idea of control over resources, or resource rights. Following the work of Elinor Ostrom (2000: 339; Schlager and Ostrom, 1992: 250), it is possible to differentiate between at least five different kinds of resource rights, namely, the right to access (i.e. the right to enter a resource/area and enjoy non-subtractive benefits), the right to withdrawal (i.e. the right to remove or obtain resources or resource units), the right to exclude (i.e. the right to determine access and/or withdrawal), the right to manage (i.e. the right to regulate use patterns and transform the resource), and the right to alienate (i.e. the right to sell or lease the resource). On top of these five rights we should include a right to derive financial benefit (Armstrong, forthcoming), which is the resource right Thomas Pogge's work is particularly concerned with.

Full control over natural resources, as it is postulated in the 1962 Resolution on Permanent Sovereignty over Natural Resources and in Simmons's (2001) and Stilz's (2009: 195) work, thus refers to holding all six of these rights. However, from what we said thus far nothing seems to suggest that being a functioning sovereign and self-determining state necessarily requires all six resource rights. In fact, as the following arguments will hopefully show, there are good reasons to see the six abovementioned rights as part of a divisible bundle of resource rights. That is to say, some rights might indeed (at least to a certain extent) be necessary for a state's sovereignty and self-determination, while others might (at least to a certain extent) not.

From what was said so far, one can see that in order to be considered sovereign, states need a certain amount of ultimate legal authority and power. Moreover, in order to be considered self-determining, states need to be free from domination and arbitrary outside interference. To these two requirements we can add that states can, at least on an instrumental-functionalist reading of the importance and legitimacy of states, only claim to be legitimately sovereign and self-determining if they do both respect the relevant rights and interests of members and non-members, and provide justice and common good promoting institutions for their citizens.

Taking this definition of sovereign and self-determining statehood as the starting point, we can now assess which kinds of resource rights (if any) are necessary for

meeting the abovementioned criteria.

Let us start with the right to access, which is the right to enter a resource and/or area and to enjoy non-subtractive benefits. It seems obvious that any state which wants to enjoy legal authority, power and freedom from domination needs free and unhindered access to a set of resources. Hence, enjoying the right to access is definitely a necessary requirement for sovereign and self-determining statehood.

However, what exactly does it mean when we claim that states need free access to resources? Asked differently; in which shape and form is the right to access necessary for achieving sovereignty and self-determination? Is having the right to access to *all* of the natural resources found in a state's territory a necessary requirement for sovereign statehood, or is it acceptable if a state only has a right to access with respect to a select few resources?

Consider the following example: Switzerland enjoys the right to access to all surface water found in its territory with the exception of the Lac de S nin, a small lake in the mountains of Southern Switzerland. The Lac de S nin with its surface area of roughly 0.29km<sup>2</sup> is being used as a reservoir, which means the main value local people derive from it is not that they swim in the lake (which would be a non-subtractive benefit) or that they can sit at the lake's shore and enjoy the mountain panorama (which would only be possible if people had access to the lake and its shores) but that they can use the water (after it has left the lake) for local water supply. In other words, if Switzerland was going to lose the right to access to Lac de S nin, while the local population might be worse off than before, Switzerland would by no means run close to losing its sovereignty or its self-determination.

Even though the fate of the local population certainly matters, since any alternative resource administration scheme would have to make sure that people are able to meet their needs and can make a living, the example of Lac de S nin shows clearly that having the right to access to *all* the resources found in its territory is not a necessary condition for securing Switzerland's sovereignty and self-determination. Just like the existence of US military bases in Germany does not mean that Germany cannot be considered a sovereign and self-determining state, losing the right to access to some of its natural resources does not threaten Switzerland's status.

Going back to our definition of sovereign and self-determining states, one can come up with the following conclusion regarding states' rights to access: the right to access to natural resources is a key-right for sovereign and self-determining states, but

only insofar as that without access to a certain set of resources the state would be subject to domination or unable to fulfill its duties regarding its own citizens. The difficulty then is to decide in each individual case to which resources a state needs access so as to remain sovereign and self-determining. Alas, the same holds true for the other resource rights, too.

Consider another example: Saudi Arabia generates roughly 75% of its budget revenues from the oil industry, which means that it is safe to say that without control over its oil reserves Saudi Arabia would suffer significantly.<sup>xv</sup> Hence, it seems that the right to access, the right to withdrawal, the right to alienate, the right to derive financial benefit and the right to manage with respect to oil are all crucial for Saudi Arabia in order to be a sovereign and self-determining state. Imagine a world, in which Saudi Arabia had only the right to the financial benefits generated by its natural resources. In such a world, Saudi Arabia would not be a sovereign and self-determining state since somebody else would decide which resources are used and sold, and in which quantities. While there are many issues one could raise with regard to the domestic division of power within Saudi Arabia and the distribution of benefits from oil export, it is clear that Saudi Arabia does need (some) control over its resources in order to be sovereign and self-determining. However, the crucial point for this discussion here is that despite its dependency on oil one can make the case that Saudi Arabia does not *need full control with respect to all of its oil reserves*. In fact there are at least two separate reasons for this.

First, for Saudi Arabia to be free from domination and arbitrary outside interference it certainly would be good enough if Saudi Arabia had control over less than 100% of its oil reserves, as long as the part of the reserves not under Saudi control is not controlled unilaterally by a powerful rival state.<sup>xvi</sup> The case is somewhat similar to the Swiss case: Switzerland heavily depends on hydro-electric power, which makes water an even more precious resource. However, this does not entail that Switzerland needs to have access to (or even control over) all the surface water found in its territory in order to be self-determining and sovereign. Moreover, in order to fulfill its function as a state which provides for its members oil revenues are certainly crucial for Saudi Arabia, but even with 60-70% of its current oil revenues (and fair domestic distribution) Saudi Arabia would have no problem in being a functioning state. This is not to say that all states should only control 60-70% of all their natural resources. Instead the argument suggests that in this simplified example Saudi Arabia would still be a functioning state if

it controlled less than 100% of its oil.

Second, since sovereignty and self-determination are conditional rights which states are only to enjoy if they respect the relevant rights and interests of non-members, it seems doubtful that exclusive Saudi control over all oil in its territory can be justified, as there exists a history of harmful oil price manipulation by the OPEC (Organization of Petroleum Exporting Countries) states under the leadership of Saudi Arabia. As long as Saudi Arabia controls as much oil as it does right now, basically without any effective monitoring, many people in the world are utterly dependent on Saudi Arabia actually selling its oil for a reasonable price. If Saudi Arabia drives up the price, the all purpose good oil might become too dear to afford for many low income households.<sup>xvii</sup> This means that these people are in a position of extreme vulnerability simply because their relevant interests are not adequately safeguarded under the current system.<sup>xviii</sup> In other words, these people are subject to Saudi domination, in part because Saudi Arabia controls all the oil found in its territory. When it comes to respecting the fundamental interests of affected parties there can of course exist conflicts between different values, as for instance between affordable oil for the poor and protection against the long-term negative effects of burning fossil fuels. However, such cases only provide additional support to the idea that states' control over natural resources should in many cases be limited.

Both these reasons suggest that based on the requirements of being a functioning sovereign state which respects the rights and interests of both members and non-members we can conclude that, despite the oil's importance for the Saudi economy, full and exclusive control over all Saudi oil reserves by the Saudi state cannot be justified. Also, one should not forget that while the Saudi example was about general control over oil, the example could be broken down into the different resource rights mentioned earlier (i.e. withdrawal, alienation, etc.) showing that all of these resource rights are up to a degree necessary for being a sovereign and self-determining state but this does not mean that any of these rights applies to all the resources found in a certain territory.<sup>xix</sup> So what does that mean then for the resource privilege and what is the upshot for our aim to administer resources in a just and sustainable manner?

### **III. Beyond the Resource Privilege**

If the arguments in the last section are correct, the national resource privilege - as it stands now - cannot be normatively justified on the functionalist argument from state

sovereignty and self-determination. While some control over resources is necessary for becoming and remaining a sovereign and self-determining state, we saw not only that control over resources is a divisible bundle of rights, but also that there are limits to the amount and extent of resources a state needs to control in order to be a functioning sovereign community.

In fact, this analysis also seems to hold for a variant of the functionalist argument which can be found in the economic literature, namely, that state control over resources is necessary for avoiding the tragedy of the commons and governing natural resources sustainably. As the work of Ostrom (1990; 2000) shows, private ownership and state control are by no means always the best way to govern resources sustainably, which means the functionalist argument would hold only for those cases and resources for which it can be shown that state control is indeed the best way of governance.

Therefore, since state control also always implies a form of exclusion from control for others, Armstrong (forthcoming) seems right in observing that all things being equal shared (i.e. widely dispersed and accessible) control and ownership is normatively speaking better than absolute (and permanently sovereign) control for some. As long as a system of shared control were stable it could also accommodate another common argument for the national resource privilege, namely, security of access. As mentioned in the introduction, the current governance scheme seems not only problematic in terms of its normative justification but also in terms of its actual consequences, both with regard to environmental sustainability and (social and global) justice. One flaw of the current system is that many vulnerable groups lack affordable and secure access to the resources necessary for meeting their basic needs and leading a decent life. Again, it therefore seems that a system of widely shared control over natural resources – all other things being equal – would be preferable to the current system, since shared control would mean that the currently vulnerable and marginalized would have secure access to the resources they need.

So if we were to follow our analysis of the functionalist arguments, we seem to arrive at a set of rather radical conclusions. Thus, states should only be entitled to control the resources necessary to meet the basic rights of their citizens and all other resources should be controlled by institutions which can be justified on functionalist grounds. Hence, some resources might best be governed through shared local proprietorship schemes, while others might be under the control of a global commons framework. Moreover, based on the functionalist argument, it seems justified that poor

countries unable to meet the needs of their citizens through using their own limited resources should have a claim to some of the resources found in another country's territory. In short, based on the arguments presented above the national resource privilege should be replaced by a system of dispersed multi-level resource governance.

However, such a system of dispersed multi-level resource governance certainly sounds rather idealistic and utopian. Moreover, such a system seems to come with a whole range of problems and open questions. For instance, who would decide which resources states need to meet their citizens' basic needs? Is it for example permissible that Ecuador decides to declare, in the interest of biodiversity conservation, the lands of the Yasuni National Park off limits for oil-production, even if that means that Ecuador might need additional funds and resources from abroad?<sup>xx</sup> Which criteria are used to assess which resources are controlled where by whom under which principles? What happens in cases of dispute and conflict? How can we be sure that this alternative system is going to be stable and sustainable?

As the questions show, doing away with the national resource privilege might not be as easy as the normative arguments makes us believe. Moreover, since the current system is run by sovereign states, it seems naïve to assume that the international community will simply decide to let go of the resource privilege. The question then is, considering that the resource privilege is not only normatively questionable but also empirically flawed, what could a somewhat realistic alternative resource governance scheme look like?

At this point it is important to say a thing or two about the realist/idealist distinction, which necessarily comes into play when talking about politically viable options, or feasibility. In many discussions on the resource privilege, or any other issue in international politics, the main charge against alternative proposals is that they are too utopian/idealist because politics is the domain of self-interest and power. While it is certainly true that some theorists get lost in overly utopian thinking and that a proposal like the one just discussed seems unrealistic at best, many developments in international politics show that short-term self-interest does not always rule the day and that normative arguments are indeed possible. Hence, the proposal I will discuss in this section aspires to strike the right balance between normative considerations of an ideal kind and the realities of interest-politics, the international legal order and power imbalances.<sup>xxi</sup>

Before I sketch a possible natural resource governance system beyond the



national resource privilege, let me briefly consider two existing proposals for addressing the empirically observable flaws of the current system, i.e. unsustainable resource use and social and global injustice. With regard to justice, the current system lacks sufficient access for disadvantaged groups, it contributes to gross deprivation of the global poor, and the financial and material benefits from resource trade/use are distributed in unfair ways. Environmentally, meanwhile, the resource privilege contributes towards unnecessary resource depletion and unsustainable management practices, which exacerbate environmental degradation. The two proposals I briefly want to discuss are: i) greater involvement of the UN (and especially the Security Council) in resource governance questions, and a last resort option of ecological intervention (Eckersley, 2007; Nettesheim, 1996; Malone, 1996; Elliott, 2003); ii) the idea of taxing resource ownership (Steiner, 1999; Casal, 2011) as expressed in Pogge's (1994; 2008;) proposal for a Global Resource Dividend (GRD).

While both sets of proposals make a range of interesting points they ultimately not only leave the resource privilege basically untouched, but they also struggle to meet (on their own) the demands of justice and environmental sustainability.

The idea to give in environmental questions special powers to the UN Security Council, meaning that the council would either pass resolutions because of environmental crimes or even agree on the necessity for ecological intervention, comes with several problems, not only in terms of justice and sustainability, but also because it leaves the resource privilege ultimately untouched.

While it is true that greater UN Security Council involvement in environmental questions might have some positive effects such as increased concern for the environment and possibly an official addition of green human rights to the UN's human rights declaration (Hiskes, 2009) it appears doubtful whether vesting the UN Security Council with special powers would result in a major change in terms of the culture and priorities of international politics. In fact, even today the Security Council could theoretically fight against environmental crimes and unsustainable practices, but there is little willingness to do so. Part of the reason for this lack of engagement with environmental problems is that resource use and management are taken to be internal affairs of sovereign states. The reason for this obviously lies in the national resource privilege and how it is applied and interpreted.

However, giving the Security Council a role in environmental protection leaves the national resource privilege basically untouched. All natural resources found in a

certain territory would still be controlled by the respective government in that territory without sufficient concern for internal and external normative justification of this control. All the problems of the resource privilege which Pogge (2008) and Wenar (2008) identify would still exist. Moreover, considering that the Security Council's veto-powers actually happen to include three of the most ruthless environmental polluters in China, Russia and the United States makes one wonder whether relying on the Security Council is not a case of putting the fox in charge of the henhouse.

Also, the tool of humanitarian intervention already exists and it is used scarcely. So why should that be different with ecological intervention? As Eckersley (2007: 301-307) points out, the added value of a concept of ecological intervention seems indeed rather limited unless one were going to rigidly enforce the rights of animals, species and biodiversity. But which country is willing to send its soldiers abroad to protect apes or the rain forest?

Also, while some progress might be made by putting the environment higher on the agenda, it would be euphemistic to claim that giving more power to the Security Council will solve the problem of resource access for the poor, or gross deprivation. In fact, both these issues (i.e. resource access for the poor and gross deprivation) are also human rights issues, which have not been addressed with the necessary political will and commitment to really abolish these problems (Pogge, 2008). Therefore, simply turning the UN Security Council into an environmental watchdog seems insufficient for dealing with the problems of the current resource governance system. So how about a resource tax in the form of Pogge's GRD then?

Pogge (2008: 212) intends the GRD as a flat tax, which is levied on the extraction of only certain resources, such as for instance crude oil. The purpose of the GRD is according to Pogge (2008; 2011: 341-42) twofold: on the one hand, the GRD is supposed to increase the market price of certain, environmentally harmful goods so as to reduce consumption; on the other hand, the GRD is supposed to generate a stream of revenues 'that would suffice to design and implement the structural reforms and policies that would end severe human poverty once and for all'. In order to achieve both these goals Pogge assumes that we would have to levy a GRD on the extraction of a very limited number of resources so as to generate around \$300 billion per year.<sup>xxii</sup>

The main problem with Pogge's proposal is that his theory neither challenges the national resource privilege, nor does it fully address the issues of justice and sustainability. Part of the reason for this is that the scope of Pogge's GRD is actually

limited since the GRD is chiefly supposed to reduce consumption of some resources (through price increases) and eradicate poverty through revenue distribution. Both these goals are very important and laudable, but they are also just partial aspects of our further concern with justice and sustainability.

The first problem with the GRD is that it leaves the national resource privilege virtually untouched. Governments still control all the natural resources in their territory and the way these resources are used and consumed is seen as the internal affairs of a sovereign state. While Pogge (2008) does argue for the need to justify resource holdings and use within a state democratically and to increase access for the marginalized and poor within the respective country, Pogge seems to ignore the issue of external legitimacy almost completely.

Pogge's GRD seems to struggle with questions of justice on a broader scale. Imagine that China decides – as sovereign over its huge deposits of rare earths – not to extract more rare earths than the Chinese need themselves, leaving the rest of the world with too little for everybody to satisfy their current need to rare earth. Is China allowed to do so, even if non-members in other countries suffer badly because of this decision? What if the resource in question is vital for people's survival, such as clean water? According to the account of sovereignty and self-determination given in section two, a state's control over resources must also be justified towards non-members who might be relevantly affected by the state's resource management. But Pogge's GRD is silent on issues like this. While the GRD appears to be a great tool to achieve the important goal of eradicating domestic poverty, in terms of promoting justice on a broader scale the GRD appears vulnerable.

Another problem with the GRD is that its main tool is putting a price on resource extraction. However, as others have argued (Hayward, 2005; Reichel, 1997) putting a price on resources neither guarantees that the ecological problem is solved, nor does it actually manage to challenge and dissolve global power structures, especially where those are based on financial might. Increasing the costs of exploitative resource extraction and consumption can easily lead to a situation in which the rich do not really feel the difference, while those who are poor, but not poor enough to receive part of the dividend, cannot afford goods due to increased prices. Thus, if we really want to make sure that our resource use is just and sustainable, a GRD is not good enough since the problem of disadvantage and restricted access is only pushed onto another group of people.

Moreover, making resource extraction more costly does not mean that the extracting industries are actually going to lower their extraction rate, as long as they are able to pass on the increased costs to the consumers. So to assume that a flat tax on resource extraction is going to slow down our hunger for oil and that such a tax would provide enough incentive to use alternative, environmentally less harmful energy sources seems a bit premature. This is a familiar problem from the discussion on climate change mitigation policies, as for instance carbon taxes only put a price on emissions but fail to specify ceilings for overall pollution. This means that carbon taxes are not well suited to reliably slow down emissions fast enough to reach mitigation targets (Schuppert, 2011: 312). Therefore, as long as people in the affluent industrialized countries are willing to pay the price for certain resources/products, a small tax won't stop resource depletion and environmental degeneration. Put crudely, if you really like it, then you shouldn't put a price on it.

Overall, while a GRD can certainly help to spread the financial benefits from the extraction and sale of resources such as oil, ultimately a GRD can neither fully address the problem of global domination and injustice connected to the issue of national control over natural resources, nor offer a convincing solution to the challenge of unsustainable resource management. A GRD, or some other resource tax, could of course be one of the tools an alternative resource management scheme would use. However, on its own the GRD is not sufficient. So what kind of system should we aim for then?

In light of the normative argument presented earlier, as well as the practical concerns with the current system, I want to suggest that the setting-up of an International Court of the Environment (ICE) could be a crucial change to the existing system, especially if it went hand in hand with the fleshing out of the environmental dimension of the existing human rights regime and a more general challenging of the justificatory logic of the current resource governance scheme through stronger civil society participation within international law and politics. While the establishment of an ICE obviously cannot guarantee that all resource administration, use and consumption will be perfectly just and sustainable, it would go a long way towards making resource governance environmentally less harmful and socially more just.

Moreover, since the proposed ICE would build on normative principles established within international politics and law, it hopefully presents a realistic/feasible first step towards better resource governance, even though it lacks the radical appeal of the changes discussed above.

### *An International Court of the Environment (ICE)*

The idea of an International Court of the Environment (ICE) is as such nothing new.<sup>xxiii</sup> Alfred Rest (1994; 1999) and Amedeo Postiglione (1993), for instance, have promoted the idea of an ICE for the past 20 years. However, the problem especially with Rest's call for an ICE is that it is overly ambitious, since Rest (1994: 173-174) argues that an ICE should have criminal jurisdiction to prosecute individuals for crimes against the environment, as well as the right to start investigations and proceedings on its own motion (Rest 1999: 37). Similarly, Postiglione seems to see the establishment of an ICE as the beginning of a new age of breaking with the established international order in the name of individual environmental rights and planetary well-being, which sounds somewhat utopian. Thus, neither Rest's nor Postiglione's proposal for an ICE seems really promising.

Moreover, as Sean Murphy (2000: 333) points out any call for a new international court would first have to prove that existing fora, like the International Court of Justice (ICJ) are inadequate for the task at hand. So why should we set up an ICE if we already have the ICJ, which even has a special chamber for environmental matters, which was created in 1993?

There are several issues with the ICJ when it comes to using it as an environmental court. Firstly, the ICJ very much subscribes to the idea that transboundary environmental cases brought before the court are chiefly issues about sovereignty and territoriality. This line of reasoning has dominated international environmental law from its very beginnings (Stephens 2009: 14), as exemplified by the Trail Smelter Arbitration Case, which is widely considered to have been the first transboundary pollution case. Thus, it hardly comes as a surprise that the ICJ has used similar reasoning in the few environmental cases that were brought before it.

Moreover, the environmental track record of the ICJ is rather unimpressive, since environmental concerns and well-established international norms with regard to the environment have played almost no role in cases such as the Gabčíkovo-Nagymaros Project case between Hungary and Slovakia (which was adjudicated strictly in terms of whether an agreement between the two countries from 1977 was still valid), and Argentina's unsuccessful case against Uruguay's construction of a paper pulp mill on the river Uruguay. It is doubtful that this practice will change in Ecuador's pending case against the spraying of toxic herbicides on the Colombian side of the border. Since courts

are not known for their flexibility and suffer from a certain path-dependency by establishing (binding) precedent for their own adjudication procedures, it seems unlikely that the ICJ will significantly shift its focus in future environmental cases.

It, therefore, does not seem very wise to hope that the ICJ will spearhead the 'greening' of international law and politics. In fact, as Ratner (2013: 17) points out, the 'ICJ is actually a highly conservative tribunal ... avoiding politically contentious cases as it did in France's nuclear testing'. Moreover, the ICJ displays according to Ratner (2013: 17) 'overt disdain for distributive justice'. These observations do bode ill for theorists who hope to use the ICJ as a global justice and environmental sustainability enhancing institution.

A further problem with the ICJ is also that most states do not see it as an environmental court and some states, such as Poland, even refuse to accept the ICJ's claim to environmental jurisdiction. This state of affairs partially also explains why the ICJ's special chamber for environmental disputes has never been used. In fact, even the ICJ itself has ceased to elect members for the chamber, since it is unlikely that any case will ever be brought before it.

Considering then that the ICJ does indeed not seem suitable to act as an international court of the environment, the question is whether the establishment of an ICE is a) at all feasible and b) if it is feasible, how an ICE can advance justice and sustainability, as well as challenge the national resource privilege.

The idea of an ICE I want to defend here is much less radical than Rest's and Postiglione's proposals. The ICE is not supposed to be an environmental super-court, which hunts down polluters around the globe. Instead, the ICE is supposed to work with existing normative principles from international environmental law and promote – by being a distinctly environmental court – awareness for environmental issues within the existing global order. Since an ICE can only be effective if it is recognized by the majority of states as a legitimate judicial authority the ICE cannot break too radically with the principles underlying the existing system. This means that the ICE has to respect states' claims to sovereignty and self-determination, while using established principles in international law to weaken the privileges associated with sovereignty and self-determination. As McCallion and Sharma (2000: 358) argue one of the main accomplishments of an ICE could be to turn soft law principles and customary norms into established customary law. Considering the wide range of existing normative principles (see below) enshrining some of these principles into customary law proper

would indeed be a significant achievement.

In order for the establishment of an ICE to be a feasible and realistic option, it is necessary that the ICE on the one hand promises benefits for all states and on the other hand that the jurisdiction of the ICE does not overtly threaten states' self-determination and sovereignty. Therefore, the ICE should not be intended as an adjudicating body which determines strict principles of liability, but rather as an impartial court which offers internationally legitimate dispute settlement based on established norms and arguments. The reasons for this strategy are fairly obvious. Past attempts to establish strict liability principles, such as the Council of Europe's (CE) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993), have been ill-fated. The CE's Convention, for instance, only needed to be ratified by three parties to come into effect and it still failed.<sup>xxiv</sup> Moreover, the international community has had very good experiences with a similar approach concerning the Law of the Seas (LOS). The establishment of the permanent International Tribunal for the Law of the Seas (ITLOS) offers clear dispute settlement guidelines without too heavily infringing on states' rights to sovereignty and self-determination. The ICE would provide the next step in this process by being an environmental court on the global level.

The establishment of such a court would most likely be beneficial for all states, both in terms of secure access to resources and in terms of protection against foreign environmental threats. A further reason why states would support the establishment of an ICE is that the ICE – by using already existing international norms – would provide a stable and legitimate framework for all parties. Since no state no matter how well off in terms of military power, economic might or natural resource endowment is free from significant interests in resources outside its territory, and also somewhat vulnerable to possible unsustainable resource abuse in other countries, having such a framework available would prove extremely valuable. In a world facing anthropogenic climate change and rapid environmental degeneration virtually no country can afford not to care about resource management practices in other countries. Therefore, as long as the conditions for ICE litigation are well-enough defined, so as to resolve all doubts that the ICE could turn into a dominating agency which threatens the sovereign powers of self-determining states as such, there seem to be good reasons to believe that an ICE could indeed be in everybody states' (self-)interest.

So what are the norms then around which the ICE should operate? Within international environmental law, taken to imply soft law instruments, as well as treaty

texts and declarations, one can discern at least eight core normative principles: sovereignty, cooperation, no harm, precaution, equitable use, sustainable use, sustainable development and intergenerational equity. Furthermore, one could include the polluter pays principle (PPP) and the principle of common but differentiated responsibilities (PCDR), both of which have been widely used in the climate negotiations within the United Nations Framework Convention on Climate Change (UNFCCC). It is these ten principles which shall provide the normative backbone of the future ICE. Let me briefly explain each principle and highlight its importance for current and future resource governance.

The principles of sovereignty and cooperation are cornerstones of international law. As mentioned earlier, the ICE can only be successful if it respects states' claims to sovereignty and it must use the other nine principles to set out the limits of these claims. The idea of cooperation meanwhile simply holds that states should cooperate with each other in transboundary governance as well as in finding a settlement for disagreements and disputes. Since the ICE is not supposed to replace existing arbitral tribunals, which play an important role in providing non-adversarial solutions for disputes, the principle of cooperation will continue to encourage states to find a solution outside the court room.

The principle of no harm stresses the basic limits of sovereignty and self-determination, namely that even sovereign and self-determining states are not allowed to cause unnecessary and preventable harm to others. The principle of precaution, meanwhile, provides a further extension of this idea by stressing each states' responsibility to first explore possible negative side-effects of an intended action before carrying it out. While the principle of precaution is a controversial one, since it calls for an ethics of risk assessment and scientific evidence, it has become a very influential norm especially within international environmental soft law. The 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal offers an interesting example for the observable shift in international law from the justificatory logic of something being permissible until shown to be harmful to a more precautionary approach, requiring consent and scientific proof (Joyner 2005: 215). Taken together, the principle of no harm and the principle of precaution can be used by the ICE to promote a more risk-sensitive approach to environmental issues which will further strengthen the international push for wider and more rigid environmental impact assessments as part of policy-making. Moreover, by applying principles such as



no harm and precaution the ICE can make an important contribution to defining the environmental responsibilities and conditions of state sovereignty.

Similarly, the principles of equitable use, sustainable use and intergenerational equity all provide potentially powerful tools to promote a necessary shift in resource governance and resource use, especially with regard to promoting intra- and inter-generational justice. Since these three principles are widely accepted as legitimate norms in soft law, the ICE could provide a way to establish these norms as part of the international legal canon. Ideas such as equitable use, sustainability and especially intergenerational equity can impose new limits to the over exploitation and rapid depletion of scarce natural resources. However, if the ICE is supposed to be a functioning court recognized by the international community the use of these norms will not mark an open radical break with the existing system but rather aim at changing the justificatory logic of current governance arrangements by using the tools of international law.

The principle of sustainable development will probably mainly be used by developing nations to protect their economic interests, just like in the debate on climate change policy. However, even the principle of sustainable development does offer a certain potential for advancing justice and sustainability, for instance if the principle were used in Ecuador's attempt to protect biodiversity within the Yasuni National Park.<sup>xxv</sup>

The PCDR could also be used for supporting this project, since the PCDR holds that states have due to their different powers and histories varying responsibilities in achieving the common goal of promoting peace, justice and sustainability. However, responsibility is – if morally charged – a dangerous concept and it seems fair to assume that the ICE will try to stick to morally more neutral terrain. Similarly, the PPP, which is a principle of strict liability will probably be less prominent in the ICE, although in cases of transboundary pollution the PPP might of course be the obvious choice of justificatory principle for settling a dispute and distributing the burdens of rectification or compensation.

As this brief overview shows, existing international environmental law provides a whole range of principles which can help in changing resource governance, both in terms of its actual structure as well as in terms of its normative justification. In an age of growing securitization, principles like no harm, precaution and sustainable use are potentially powerful tools for changing the international dynamics of resource

governance. Moreover, the ICE would have the advantage that it can learn from the successes and mistakes of the ICJ, the ICC and other international courts. The ten principles in conjunction with universally accepted principles such as basic human rights would provide the basic criteria for the court's adjudication. By applying these principles the ICE could within the existing between claims to sovereign self-determination and the demands of greater state responsibility for the environment tip the scales towards responsibility. While such a process will take time, it could prove invaluable in the long run.

In terms of its composition the ICE should follow a similar set up as the ICJ, which has proven fairly successful. The UN General Assembly and the UN Security Council should elect judges from a list compiled through the national groups at the Permanent Court of Arbitration (PCA). However, other than the ICJ the ICE should give standing to both states and civil society groups, since global resource governance often involves non-state actors, such as corporations. Moreover, giving standing to civil society groups would strengthen the role of non-governmental organizations (NGOs) and thus potentially increase accountability. While there is obviously a lot more one could and should say about the workings and structure of a future ICE, this short overview hopefully suffices to show the potential benefits of establishing such a court.

As mentioned earlier, an ICE on its own will not suffice for making resource governance more just and sustainable. What is also needed is a general greening of international politics and law, as well as a strengthening of key norms, such as accountability, legitimacy, transparency and civil society participation.

Take for instance the idea of fleshing out the environmental dimension of people's basic human rights, which is widely discussed in the literature. While many theorists call for adding distinct rights to a green future (Hiskes 2009), or a clean and healthy environment (Weston and Bollier 2013) to the existing human rights catalogue, an alternative approach is to stress the fundamental importance of a healthy and functioning environment for the already existing basic rights, especially the right to life, liberty and security of person. One way of doing this would be by defending something like a human right to the benefits of life-sustaining ecosystem services (Schuppert 2012). However, whether the international community will be able to agree on such a right as part of the UN Declaration of Human Rights is rather doubtful.

Thus an alternative solution is to use the application of existing basic human rights in international law and politics as a way to strengthen the environmental

dimension. As MaCallion and Sharma (2000: 355) suggest, connecting the right to life and its environmental preconditions within the normative discussions underpinning international law could go a long way towards establishing environmental protection as a basic norm of customary international law.

While lobbying for the greening of the human rights regime might as such not appear to be particularly radical, or even fruitful, one should not underestimate the cumulative effects of discursive interventions and the power of normative arguments within the realm of international politics. Since human rights are a cornerstone of the existing system, and since the protection of the right to life is *jus cogens*, highlighting the environmental preconditions of this right can help in making certain forms of environmental protection and environmental harm prevention part and parcel of states' *erga omnes* responsibilities. Considering that currently all too often environmental costs are externalized, especially by countries from the global North, establishing certain environmental responsibilities for all states as part of the international legal architecture seems to be an important step on the path to justice and sustainability (Odenthal 1998).

Sovereignty and self-determination come - as conditional rights - with a range of responsibilities, that is, with special duties that go along with possessing such rights and powers. If we were to take these responsibilities seriously, a whole range of existing forms of resource control and resource use would be unmasked as ethically highly problematic. After all, if claims to sovereignty and self-determination are to be considered legitimate, they are not allowed to lead to instances of cross-border domination. However, the problem is that the justificatory logic underpinning many current arrangements pays very little attention to these normative conditions. The ICE could help in addressing this problem.

However, while the ICE is intended to use existing norms from treaties, agreements and international environmental soft law in general and turn them into the normative framework of its litigation procedures, it is clear that further steps are necessary, for instance further extending the range of normative arguments to be considered in international law, greater involvement of civil society actors, and providing avenues of contestation for affected parties at the local, regional and national level.

Therefore, the national resource privilege should be publicly challenged on the basis of the arguments presented earlier, in an attempt to expose its flawed justificatory

logic. Moreover, there needs to be a push for more accountability, transparency and participatory involvement of civil society actors so as to make the institutions of global resource governance and international law actually legitimate. A legitimate global governance architecture, however, also requires effective channels for democratic participation and contestation (Buchanan and Keohane 2006). After all, the weakening of the national resource privilege is supposed to facilitate the monitoring of specific extraction and consumption practices, and to increase transparency and accountability.

In terms of resource access and resource allocation weakening the resource privilege through the establishment of an ICE is only part of the solution. In order to protect every person's basic rights and interests we will also need a distinct greening of international trade and investment law. However, it goes without saying that more just and more sustainable resource governance can only be achieved if states continue to be willing to enter into progressive international agreements, if the application of international law actually realizes the immense potential of existing norms, if participation of stakeholders is increased, and if justice and sustainability concerns are not constantly trumped by short-term economic gains and the interests of global capital. As the arguments in this section hopefully showed, establishing an ICE might be a first important step towards resource governance beyond the national resource privilege.

## **Conclusion**

The paper started by looking at the current system of natural resource governance, highlighting a set of issues with the existing national resource privilege. The paper then critically analyzed existing functionalist justifications for the resource privilege, namely those which claim that control over all natural resources within a given territory is necessary for the sovereignty and self-determination of the state in question. However, the analysis not only showed that control over resources is a divisible set of rights, but also that the resource privilege in its current form is not a necessary requirement for states' self-determination and sovereignty. Based on these findings the last section sketched some possible institutional arrangements for an alternative resource governance system, suggesting the establishment of an IEC, in an attempt to use the normative potential of existing international environmental law for greening global politics.

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<sup>i</sup> I use the word traditionally even though the tradition as such is a rather short one, since sovereignty over natural resources entered international law quite recently, namely post World War II. See Schrijver (1997) for a detailed account of this development.

<sup>ii</sup> Ronald Mitchell (2003) counted (ten years ago) more than 750 international environmental agreements.

<sup>iii</sup> Probably the most prominent example is the international governance of the seas, which was significantly helped and shaped by the adoption of the 1982 UN Convention on the Law of the Seas (LOS).

<sup>iv</sup> An exception to this rule is the work done by Chris Armstrong, which I will come back to below.

<sup>v</sup> Pogge is one of the few philosophers who has dealt in depth with the issues of resource holdings, access to the means to subsistence and how to change the global order. In fact, Pogge seems to embrace the resource privilege for purely pragmatic reasons, since he is more concerned with finding a way to eradicate poverty within the current system than with proposing an alternative in ideal theory. I will come back to several aspects of Pogge's work later in the paper.

<sup>vi</sup> Beitz actually argues for a global difference principle and not for global resource egalitarianism proper. However, his arguments are very much in the same vein as the ones presented by Barry and Casal.

<sup>vii</sup> Since my focus in this paper is on a particular argument for the national resource privilege and what a somewhat realistic alternative resource governance scheme could look like, I will leave these cosmopolitan liberal egalitarian theories aside.

<sup>viii</sup> I will explain the use of the term functionalist in section I.

<sup>ix</sup> Needless to say, the arguments presented in this paper rest on some important assumptions, for which I cannot argue here, namely, that certain principles of justice and sustainability do apply globally and that they should guide our control of natural resources. However, I will try to be as far as possible - as Pogge calls it - 'ecumenical' when referring to these ideas.

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<sup>x</sup> This is a point I will return to in section III. Also, It is important to note that the principles of territorial sovereignty and national self-determination were partially intended as a protection mechanism for small states and those countries which liberated themselves from the yoke of colonialism. Hence, my aim in this paper is not to challenge sovereignty and self-determination as such, since both concepts fulfill important functions in our current system.

<sup>xi</sup> Due to space constraints I cannot engage with these attempted justifications in any detail. Hopefully it suffices to say that I agree with Armstrong's (forthcoming) observation that attachment-, occupation- and improvement-based claims can only (if at all) justify control over very particular resources but not permanent sovereignty over all the resources found in a certain territory.

<sup>xii</sup> It is important to note that not all existing theories necessarily subscribe to all these reasons for valuing self-determination and sovereignty, since some are more concerned with basic need-provision while others might primarily care about one of the other aspects. Similarly, some of the theories discussed here focus on self-determination, while others stress the role of sovereignty.

<sup>xiii</sup> Hillel Steiner (1998), for instance, claims that territorial rights are nothing else but aggregated individual property rights.

<sup>xiv</sup> For a detailed account of domination and its perils see Lovett (2010).

<sup>xv</sup> I am grateful to an anonymous reviewer for bringing up this example.

<sup>xvi</sup> By control I refer here to the aforementioned different resource rights (i.e. access, withdrawal, etc.).

<sup>xvii</sup> Needless to say, the fact that oil is an all purpose good probably should be considered a problem in itself. However, this does not concern the argument here.

<sup>xviii</sup> It is important to note that theoretically of course the satisfaction of people's basic interests does not per se require access to affordable oil. However, in the world we live in today oil is a *conditio sine qua non* for many people living in extremely precarious and vulnerable circumstances.

<sup>xix</sup> This means that for instance the right to withdrawal is necessary for Saudi Arabia to be a sovereign state, but only in certain instances, since Saudi Arabia would remain a sovereign and self-determining state even if it were not enjoying a right to withdrawal with regard to 10% of its oil reserves. The same holds true for the other resource rights.

<sup>xx</sup> The Yasuni Ishpingo Tambococha Tiputini Trust Fund initiative is a highly interesting case, since the government of Ecuador tries to convince the international community (and the industrialized countries of the global North in particular) that they should share the financial burden associated with biodiversity conservation in the national park, since the whole planet will benefit in the long run. See: <http://yasuni-itt.gob.ec>

<sup>xxi</sup> In this respect I consider the following proposal an attempt to increase collaboration between ethics and international law. See Ratner (2013).

<sup>xxii</sup> In more recent papers Pogge (2011) discusses the possibility of also including pollutants in the GRD. I will not deal with this idea here, since the focus of the paper is on control over natural resources.

<sup>xxiii</sup> See for instance the website of the coalition for an ICE: <http://icecoalition.com/>

<sup>xxiv</sup> The 1972 Stockholm Declaration of Principles meanwhile only mentions liability as a future issue (in Principle 22), which might be one of the reasons why states could agree on it.

<sup>xxv</sup> See note xx above.